Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-02(NCVC)(W)-1174–05 OF 2012 AND A-02(NCVC)(W)-1114–05 OF 2012

B

MOHD HISHAMUDIN, MAH WENG KWAI JJCA AND ROHANA YUSUF J

29 MAY 2013

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Contract — Claims — Claim for money lent — Contract to carry out road construction project — Current bank account opened — Cheques pre-signed and authorised to make necessary payments from time to time — Management fees for services rendered during project — Claim for financial advance — Whether there was proof of financial advances — Appeal against decision of High Court

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The respondent was awarded a contract to carry out a road construction project ('the project) for a period from 1 February 2005 to 15 August 2005 but the project was completed 15 October 2005 when it was handed over to Jabatan Kerja Raya ('JKR'). The respondent appointed M/s VN Sunrise Sdn Bhd ('Sunrise') as the subcontractor while the appellant was appointed as the project manager for the project. The appellant's responsibility was to manage the accounts for the project and to make payments to subcontractors. For this purpose, the respondent opened a current bank account with Bank Bumiputra Commerce Bhd in Johor Bahru and pre-signed cheques and authorised the appellant to make the necessary payments from time to time. It was agreed that the appellant would be paid management fees for services rendered during the project. The appellant claimed that besides providing management services, it had also given financial advances to the respondent and therefore claimed for the balance sum of RM301,767.40. The respondent denied receiving the sum of RM444,000 or any part thereof as financial advances from the appellant and contended that the sum of RM19,230 due as management fees had been paid to the appellant. In its counterclaim, the respondent claimed for the sum of RM535,835.04, which was purportedly paid by the appellant to Sunrise but was instead paid to the appellant itself. The learned judge dismissed both the appellant's claim and the respondent's counterclaim. Hence, the present appeal.

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Held, dismissing the claim and allowing the counterclaim with costs:

(1) The appellant's overall initial claim comprised mainly of two parts namely, the sum of RM444,000 being financial advances and the sum of RM287,880.60 being management fees alleged to be owing by the

respondent. The appellant had failed to prove on a balance of probabilities, that it had in fact advanced the sum of RM444,000 to the respondent. No evidence was adduced to show that the respondent had even requested for the financial advances and more importantly, there was no evidence adduced to prove that the respondent had in fact received the said sum (see paras 13–14).

(2) The appellant in order to show that the financial advances had been made referred to the payment vouchers. However, a perusal of the payment vouchers clearly showed that none of the vouchers had been signed or endorsed by the respondent in acknowledgement of receipt of the advances. There was also no evidence adduced by the appellant to explain as to whom in the respondent company had requested for the advances nor the reason for the need of such advances (see paras 15–16).

(3) For quite obvious reasons, the appellant had seen it fit to disguise the interest as management fees. The appellant did not plead for any claim for interest but for management fees only. The court agreed with the respondent that in actual fact, no management services were rendered by the appellant to the respondent after 14 October 2005 as there was no further need for such services since the project had been completed and handed over to JKR on 15 October 2005 (see para 18).

(4) As the appellant had failed to prove that it had made the financial advances of RM444,000 to the respondent, there was no question of any interest payment due on the advances. Moreover as the claim for interest had been disguised as management fees, accordingly there could be no arrears of management fees due and payable to the appellant (see para 22).

(5) The appellant had no authority to utilise the two cheques to pay itself when the respondent's payment vouchers had clearly instructed the appellant to pay to Sunrise. The issue of whether there was an agreement between Sunrise and the appellant for the appellant to pay itself out of the respondent's account did not arise as the respondent was not aware of any agreement to this effect and had most certainly not authorised the appellant to do so (see para 26).

[Bahasa Malaysia summary

Responden telah diawardkan kontrak untuk menjalankan projek pembinaan jalan raya ('projek') untuk tempoh dari 1 Februari 2005 hingga 15 Ogos 2005 tetapi projek itu telah siap 15 Oktober 2005 apabila ia telah diserahkan kepada Jabatan Kerja Raya ('JKR'). Responden melantik Tetuan VN Sunrise Sdn Bhd ('Sunrise') sebagai subkontraktor manakala perayu telah dilantik sebagai pengurus projek untuk projek tersebut. Tanggungjawab perayu adalah untuk menguruskan akaun bagi projek itu dan membuat pembayaran kepada subkontraktor. Bagi tujuan ini, responden membuka akaun bank semasa

dengan Bank Bumiputra Commerce Bhd di Johor Bahru dan cek pra-ditandatangani dan dibenarkan perayu untuk membuat bayaran yang diperlukan dari semasa ke semasa. Adalah dipersetujui bahawa perayu akan dibayar fi pengurusan untuk perkhidmatan yang diberikan dalam projek ini. Perayu mendakwa bahawa selain menyediakan perkhidmatan pengurusan, ia telah juga memberikan pendahuluan kewangan kepada responden dan oleh itu menuntut baki yang berjumlah RM301,767,40. Responden menafikan menerima jumlah RM444,000 atau apa-apa bahagian pendahuluan kewangan daripada perayu dan menegaskan bahawa sejumlah RM19,230 yang merupakan fi pengurusan telah dibayar kepada perayu. Dalam tuntutan balasnya, responden menuntut jumlah wang sebanyak RM535,835,04, yang kononnya telah dibayar oleh perayu kepada Sunrise tetapi sebaliknya dibayar kepada perayu sendiri. Hakim yang bijaksana telah menolak kedua-dua tuntutan perayu dan tuntutan balas responden. Oleh itu, rayuan ini.

Diputuskan, menolak tuntutan dan membenarkan tuntutan balas dengan kos:

(1) Secara keseluruhan tuntutan awal perayu terdiri daripada dua bahagian iaitu, jumlah RM444,000 yang menjadi pendahuluan kewangan dan jumlah RM287,880,60 menjadi fi pengurusan yang dikatakan terhutang oleh responden. Perayu telah gagal membuktikan atas imbangan kebarangkalian, bahawa ia telah mendahulukan jumlah sebanyak RM444,000 kepada responden. Tiada bukti yang dikemukakan untuk menunjukkan bahawa responden telah pun meminta pendahuluan kewangan dan lebih penting lagi, tiada bukti yang dikemukakan untuk membuktikan bahawa responden sebenarnya menerima wang tersebut (lihat perenggan 13–14).

(2) Perayu untuk membuktikan bahawa pendahuluan kewangan telah dibuat merujuk kepada baucar bayaran. Walau bagaimanapun, semakan ke atas baucar bayaran jelas menunjukkan bahawa tidak ada baucar telah ditandatangani atau disahkan oleh responden dalam resit akuan penerimaan pendahuluan tersebut. Juga tidak terdapat bukti yang dikemukakan oleh perayu untuk menjelaskan siapa di dalam syarikat responden yang telah meminta untuk pendahuluan ataupun sebab untuk keperluan pendahuluan tersebut (lihat perenggan 15–16).

(3) Atas sebab-sebab jelas, perayu telah menukarkan faedah sebagai fi pengurusan. Perayu tidak merayu untuk apa-apa tuntutan untuk faedah tetapi fi pengurusan sahaja. Mahkamah bersetuju dengan responden bahawa pada hakikatnya, tidak ada perkhidmatan pengurusan yang diberikan oleh perayu kepada responden selepas 14 Oktober 2005 kerana tidak ada keperluan lagi untuk perkhidmatan tersebut sejak projek itu telah siap dan diserahkan kepada JKR pada 15 Oktober 2005 (lihat perenggan 18).

(4) Oleh kerana perayu telah gagal untuk membuktikan bahawa ia telah membuat pendahuluan kewangan sebanyak RM444,000 kepada responden, tidak ada persoalan apa-apa bayaran faedah yang dikenakan ke atas pendahuluan. Lebih-lebih lagi kerana tuntutan untuk faedah telah ditukar sebagai fi pengurusan, sewajarnya memang tidak ada tunggakan fi pengurusan dibayar kepada perayu (lihat perenggan 22).

(5) Perayu tidak mempunyai kuasa untuk menggunakan kedua-dua cek untuk membayar dirinya sendiri apabila baucar bayaran responden telah jelas mengarahkan perayu membuat pembayaran kepada Sunrise. Isu sama ada terdapat perjanjian antara Sunrise dan perayu untuk perayu membayar sendiri daripada akaun responden tidak timbul kerana responden tidak mengetahui apa-apa perjanjian untuk kesan ini dan telah pasti tidak membenarkan perayu untuk berbuat sedemikian (lihat perenggan 26).]

Notes

For a case on claim for money lent, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3758.

Cases referred to

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Appeal from: Civil Suit No 22NCVC-4–01 of 2012 (High Court, Ipoh)

Dhaliwal (R Ananthan with him) (Ananth & Associates) in Civil Appeal No A-02(NCVC)(W)-1174–05 of 2012 for the appellant.

M Yunus Ali (Yunus Ali & Kam) in Civil Appeal No A-02(NCVC)(W)-1174–05 of 2012 for the respondent.

M Yunus Ali (Yunus Ali & Kam) in Civil Appeal No A-02(NCVC)(W)-1114–05 of 2012 for the appellant.

Dhaliwal (R Ananthan with him) (Ananth & Associates) in Civil Appeal No A-02(NCVC)(W)-1114–05 of 2012 for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] In early 2005 the respondent in *Rayuan Sivil* No A-02(NCVC)(W)-1174–05/2012 (*Rayuan* 1174) was awarded a contract to carry out a road construction project in Tanjung Rambutan Perak ('the project'). The contract period was from 1 February–15 August 2005. However, the project was completed by the respondent on 15 October 2005 when it was handed over to Jabatan Kerja Raya ('JKR').

[2] On 1 February 2005 the respondent appointed M/s VN Sunrise Sdn Bhd (Sunrise) as the subcontractor for the project.

[3] At the same time the respondent appointed the appellant as the project manager for the project. The scope of work of the appellant was to manage the accounts for the project and to make payments to subcontractors for goods and materials supplied.

[4] In order to receive payments from JKR, the respondent opened a current bank account with Bank Bumiputra Commerce Bhd in Johor Baru and to facilitate payments by the appellant from this account, the respondent pre-signed cheques and authorised the appellant to make the necessary payments from time to time.

[5] It was agreed between the appellant and the respondent that the appellant would be paid management fees for services rendered during the project that is, from 1 February–15 October 2005.

THE APPELLANT'S CLAIM

[6] The appellant's claim is that besides providing management services it had also given financial advances to the respondent. The appellant claimed for the balance sum of RM301,767.40 which was made up as follows:

Total advance given	- RM444,000
Add: Hire of motor vehicle	- RM1,500
Add: Management Fee (2005–31 May 2009)	- RM203,594.33
Less advance refunded	- RM431,621.20
Balance	- RM217,473.13
Add: Management fee (Jun 2009–31 March 2011)	- RM84,294.27
Balance owing to date	- RM301,767.40

THE RESPONDENT'S DEFENCE AND COUNTERCLAIM

[7] The respondent denied receiving the sum of RM444,000 or any part thereof as financial advances from the appellant and that the sum of RM19,230 due as management fees as at 15 September 2005, had been paid to the appellant.

[8] In its counterclaim, the respondent claimed for the sum of RM535,835.04, which sum was purportedly paid by the appellant to Sunrise but was instead paid to the appellant itself.

DECISION OF THE HIGH COURT

[9] After a full trial the learned judge dismissed both the appellant's claim and the respondent's counterclaim.

[10] The appellant and the respondent filed separate notices of appeal and the two appeals namely in *Rayuan* 1174 and *Rayuan Sivil* No A-02(NCVC)(W)-1114–05/2012 (*Rayuan* 1114) were by consent heard together.

DECISION OF THE COURT OF APPEAL

[11] Upon reading the records of appeal, the written submissions of counsel for the appellant and the respondent in both the appeals and upon hearing counsel aforesaid, the court dismissed the appellant's appeal in *Rayuan* 1174 and allowed the appellant's appeal in *Rayuan* 1114 on the counterclaim with costs.

[12] Being dissatisfied with the decision, the appellant in *Rayuan* 1174 now applies for leave to appeal against the said decision to the Federal Court.

GROUNDS OF DECISION

[13] The appellant's overall initial claim in *Rayuan* 1174 was comprised mainly of two parts namely, the sum of RM444,000 being financial advances and the sum of RM287,880.60 being management fees alleged to be owing by the respondent.

[14] In our judgment the court is of the view that the appellant had failed to prove on a balance of probabilities, that it had in fact advanced the sum of RM444,000 to the respondent. To begin with, no evidence was adduced at trial to show that the respondent had even requested for the financial advances and more importantly, there was no evidence adduced to prove that the respondent had in fact received the said sum.

[15] The appellant in order to show that the financial advances had been made referred to the payment vouchers appearing in *rekod rayuan jilid* 2 *bahagian* C at pp 322–326. But a perusal of the payment vouchers will clearly

show that none of the vouchers had been signed or endorsed by the respondent in acknowledgement of receipt of the advances.

[16] The five payment vouchers were dated 3 September 2005, 3 October 2005, 6 October 2005, 24 December 2005 and 27 January 2006 respectively. There was no evidence adduced by the appellant to explain as to whom in the respondent company had requested for the advances nor the reason for the need of such advances. It will be noted that the first of the purported advances was made about one month before 14 October 2005, the completion date of the project, while the second and third purported advances were made about two weeks and a week respectively before that date. No evidence was led to explain to the court as to why these advances were needed when the project was nearing completion. More so, no evidence was proferred to explain why the purported fourth and fifth advances were even necessary some 2 1/2 and 3 1/2 months respectively after the project had been handed over to JKR (see the certificate of practical completion in *rekod rayuan jilid* 2 *bahagian* C at pp 300–301). A striking omission in the evidence of the appellant was that there was nothing to suggest when the advances were to be repaid or the manner the repayments were to be effected and of course, there was nothing to suggest whether the advances were given free of interest.

[17] However, the appellant in *rekod rayuan jilid* 2 *bahagian* C at pp 296–297, purported to show a statement of accounts entitled 'Damai Setia Sdn Bhd - Tanjung Rambutan (Advance)'. This statement purported to show that the appellant had advanced the total sum of RM444,000 to the respondent and that the sum of RM287,888.60 was due and payable as 'Interest' yet at the bottom of p 296, the 'Interest' payable was clearly described as 'Being Management Fees (2005 - 31/5/09) - RM203,594.33 and Being Management Fees (June 2006 - 31/3/11) -RM84,294.27' totaling RM287,888.60. What came across to the court was that the claim for interest was disguised as management fees. But more importantly, it will be noted that this statement was a self serving statement in that it was prepared by the appellant without any acknowledgment on the part of the respondent. Further, there was no evidence adduced to show that the advances had in fact reached the respondent as no reference was made to any cheques, bank statements, bank in slips or company resolution/s at any time.

[18] Apart from the financial advances, the appellant had also claimed for the sum of RM287,888.60 being management fees. As pointed out above, this sum was in fact the interest sum charged on the Advances of RM444,000. For quite obvious reasons the appellant had seen it fit to disguise the interest as management fees. It will be noted that the appellant did not in its statement of claim plead for any claim for interest but for management fees only. The court agrees with counsel for the respondent that in actual fact no management

services were rendered by the appellant to the respondent after 14 October 2005 as there was no further need for such services since the project had been completed and handed over to JKR on 15 October 2005.

[19] The balance of the management fees in the sum of RM19,230 as at 15 September 2005 had been fully paid as contended by the respondent (see minutes of meeting in *rekod rayuan jilid* 2 *bahagian* C pp 156–159).

[20] The whole accounting story had not been told fully by the appellant as up to the date of trial, no final accounts for the project, which have to be audited and approved by both the appellant and the respondent, have been tendered to court. It will be useful to note at this juncture that the appellant has not produced any invoices to claim for the management fees.

[21] In any event and in so far as the claim for interest is concerned there was no evidence whatsoever on record to prove that the respondent had agreed to pay interest on any sum advanced by the appellant.

[22] This court is of the view that as the appellant has failed to prove that it had made the financial advances of RM444,000 to the respondent, there was no question of any interest payment due on the advances. Moreover as the claim for interest has been disguised as management fees, accordingly there can be no arrears of management fees due and payable to the appellant.

THE RESPONDENT'S COUNTERCLAIM

[23] The respondent's counterclaim (the appellant's appeal in *Rayuan* 1114) for the total sum of RM535,836.04 was rather straightforward. The respondent had instructed the appellant to pay the following two sums to Sunrise namely:

(a) the sum of RM135,836.04; and

(b) the sum of RM400,000.

[24] The instructions to pay Sunrise were made by the respondent pursuant to its payment vouchers dated 8 July 2005 and 1 October 2005 handed to the appellant. The appellant instead of paying Sunrise the said sums issued two cheques for the said amounts payable to itself (see *rekod rayuan jilid* 2 *bahagian* C pp 302 and 305), purportedly to contra an account it had with Sunrise. The payment by the appellant to itself was without the knowledge and consent of the respondent. The respondent had intended to pay Sunrise for work done but due to the breach of instructions by the appellant, the respondent continued to be indebted to Sunrise in the sum of RM535,836.04 for which Sunrise had sent six reminders to the respondent for payment.

[25] The appellant in its attempt to account for the two cheques made false entries in the general ledger of the respondent. This can be seen in *rekod rayuan jilid* 2 *bahagian* C at pp 308 and 314 respectively where the two cheques were purportedly credited to the account of Sunrise. A summary of payment of the two cheques can be seen in *rekod rayuan jilid* 2 *bahagian* C at p 306.

[26] The court is of the view that the appellant had no authority to utilise the two cheques to pay itself when the respondent's payment vouchers had clearly instructed the appellant to pay to Sunrise. The issue of whether there was an agreement between Sunrise and the appellant for the appellant to pay itself out of the respondent's account does not arise as the respondent was not aware of any agreement to this effect and had most certainly not authorised the appellant to do so.

CONCLUSION

[27] In our judgment we are of the view that the findings of the learned trial judge were against the weight of the evidence.

[28] There is a catenation of cases on the proper approach to interference by an appellate court on the findings of fact by a trial judge. But it will suffice to refer to the Court of Appeal case of *Sivalingam s/o Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 where at p 398 His Lordships Gopal Sir Ram JCA (as he then was) and Mahadev Shankar JCA held that:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself, that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

In this case we are fully mindful that this was an appeal that turned upon questions of fact. We are of the view that if there was sufficient judicial appreciation by the learned trial judge of the evidence of the facts and circumstances placed before him, he would have arrived at a different conclusion.

[29] In the result, the appellant's claim was dismissed and the respondent's counterclaim was allowed with costs.

Claim dismissed and counterclaim allowed with costs.

Reported by Afiq Mohamad Noor